

Jones v New York City Hous. Auth.

2013 NY Slip Op 33492(U)

December 18, 2013

Supreme Court, New York County

Docket Number: 107359/07

Judge: Judy H. Kluger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Judy Harris Ringer
Justice

PART 38

EMERQUIS TRACS ETAL
-v-
NYC H & H ETAL

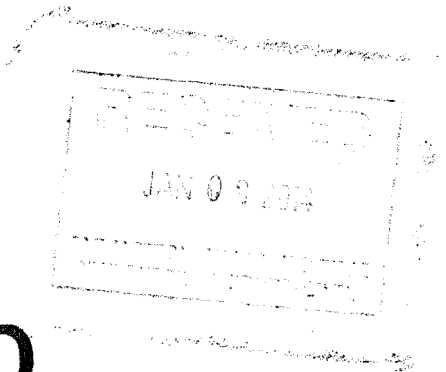
INDEX NO. 107359107
MOTION DATE _____
MOTION SEQ. NO. (02)

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



FILED

JAN 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/18/13

_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

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EMARQUIS JONES, an infant by his mother and
natural guardian, MIA HENDERSON-JONES
and MIA HENDERSON-JONES, individually,

Plaintiffs,

- against -

NEW YORK CITY HOUSING AUTHORITY,
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, ARAN DEGENHARDT, M.D.,
LAUREN CRUMP, M.D., and
ASMAA HASHIM, M.D.,

Defendants.
-----x

Judy Harris Kluger, J.:

DECISION AND ORDER

December 23, 2013
Index No. 107359/07

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COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs move for an order a) vacating certain portions of this court's prior discovery orders; b) deeming plaintiffs' obligation to provide a HIPAA-compliant authorization for the records of Lawrence Fedor, DDS, satisfied by virtue of the fact that plaintiffs already provided a copy of those records to defendants; and c) for sanctions pursuant to 22 NYCRR 130-1.1 against Sheila Gomez, Esq. for alleged false and defamatory statements directed toward Warren Willinger, Esq., plaintiffs' counsel.

The court has reviewed the plaintiffs' notice of motion, affirmation in support and exhibits dated October 28, 2013; defendant New York City Health and Hospitals Corporation's (NYCHHC) affirmation in opposition to the motion and exhibits dated November 18, 2013; defendant Corporation Counsel of the City of New York's affirmation in opposition to the motion and exhibits dated November 18, 2013; defendant New York City Housing Authority's (NYCHA) affirmation in opposition to the motion and exhibits dated November 20, 2013; and plaintiffs' respective reply affirmations dated December 6, 2013 (to Corporation Counsel), December 7, 2013 (to NYCHA) and December 7, 2013 (to NYCHHC).¹ For the reasons stated below, the plaintiffs' motion is denied in its entirety.

The within case sounds in both negligence and medical malpractice.² Based

¹The court initially rendered a decision on the instant application without having reviewed plaintiffs' reply papers. The court has now had an opportunity to review and consider same and the decision is unchanged.

²A motion to consolidate the case against NYCHA with the cases against the remaining defendants was granted by the Hon. Eileen Rakower on June 8, 2012.

upon the submissions before this court, it is undisputed that plaintiffs allege infant was exposed to lead-based paint at NYCHA-owned premises and defendants failed to properly assess the infant's risk of lead exposure and failed to diagnose and treat lead poisoning. More specifically, the plaintiffs' bill of particulars alleges that the infant plaintiff suffers from, among other things, "brain damage, loss of cognitive function; learning difficulties; diminution of IQ; developmental delay; delay in intellectual function; behavioral dysfunction characterized by difficulty in controlling his impulses, delay in emotional and social development; hyperactivity; agitation and attentional difficulties; destructive behavior; delayed fine motor development with slow response time and other conditions, the full extent of which has not yet been determined;"

The plaintiffs contend that some of the authorizations previously ordered by this court to be provided bear no relevance or relationship to infant plaintiff's injuries. In addition, plaintiffs contend that their obligation to provide an authorization for dental records from Dr. Lawrence Fedor be deemed satisfied inasmuch as copies of the records have already been provided. And finally, plaintiff requests that this court impose sanctions on Assistant Corporation Counsel Sheila Gomez for the allegedly false and defamatory statements regarding plaintiff's counsel, Warren Willinger, Esq., set forth in her correspondence dated October 3, 2013.

Defendants maintain that the previously ordered authorizations are, in fact, relevant to the instant matter based upon the alleged injuries to the infant plaintiff as set forth in both the notices of claim and bill of particulars. They aver that the broad claims of injury noted above make the medical records associated with the infant plaintiff's treatment for asthma-related conditions relevant and discoverable. Defendants have provided documentary evidence to support a correlation between asthma and the injuries alleged by plaintiff. Regarding the dental records, defendants contend that the obligation to provide a HIPAA-compliant authorization is not obviated by plaintiffs' production of uncertified copies of the records.

While the sanctions are only sought against Ms. Gomez, both counsel for NYCHA and NYCHHC have strenuously objected to the imposition of any sanctions and attest to the professionalism of Ms. Gomez throughout the pendency of this case. On behalf of the Corporation Counsel, among other arguments, Ms. Gomez explains the content and context of the October 3, 2013 correspondence in question.

Based upon the foregoing, the court finds that CPLR §3101(a) provides for "full disclosure of all matter material and necessary in the prosecution and defense of an action" The Court of Appeals held decades ago that "[t]he words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Publishing Company, 21 NY 2d 403, 406 (1968). See also, Bustos v. Lenox Hill Hospital, 29 AD 3d 424 (1st Dept. 2006).

Additionally, as set forth by NYCHHC, the Court of Appeals in Arons v. Jutkowitz,

9 NY 3d 393,409 (2007) noted that a waiver of privilege is a matter of fundamental fairness. The Court found that parties should not be able to “assert a medical condition . . . while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party’s claim (citations omitted).”

In the instant matter, this court finds that the array of injuries claimed by the plaintiffs in the notices of claim and bill of particulars broadly place infant plaintiff’s medical condition in issue such that the physician-patient privilege is waived as to the treatment in question. Further, this court notes that the authorizations now being objected to were first ordered to be provided on April 18, 2013. Despite having signed the April preliminary conference order, plaintiffs’ objections were not raised until October 3, 2013.³ On that date, the parties were given an opportunity to address the court and the court declined to change its almost 6-month old ruling and directed counsel to comply with its order and provide the authorizations on the next court date. When counsel appeared on October 16, 2013, the same arguments were reiterated and the court again directed counsel to either comply or file a motion to challenge its ruling. In the instant motion, the conclusory arguments of counsel are unpersuasive and the cases cited are inapposite.

With respect to the authorization for dental records from Dr. Fedor, plaintiffs’ arguments are equally unavailing. The defendants are entitled to obtain certified copies of the medical records directly from the provider and in order to do so, the plaintiffs must provide a HIPAA-compliant authorization. While the court is cognizant of the difficulties that solo practitioners face in their practices, providing authorizations is part and parcel of representing clients in medical malpractice cases.

Finally, with regard to plaintiffs’ motion seeking sanctions pursuant to 22 NYCRR 130-1.1, the court finds that sanctions are not warranted in this matter. On the four or five occasions that Ms. Gomez appeared before this court, she was professional and respectful toward all parties. Further, her correspondence to Mr. Willinger dated October 3, 2013 is responsive to the tone and substance of the statements and arguments made by him.⁴ In order to ensure that the best interests of all parties are

³Plaintiffs’ counsel was not present for the appearance before this court on April 18, 2013. This matter was called in the absence of plaintiffs’ counsel because the court was unable to locate counsel. This court directed the clerk to call the courtroom where counsel advised he would be and that court part was already closed and adjourned for the morning session. Despite this, the court signed the preliminary conference order inasmuch as plaintiffs’ counsel had agreed to its terms and signed it before leaving. The order directed all parties to appear on August 1, 2013. Plaintiffs’ counsel failed to appear before this court on August 1, 2013 as well.

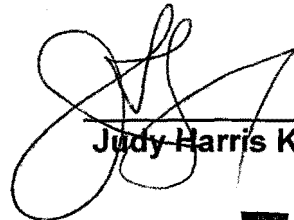
⁴This court has no intention of commenting on the plethora of allegations made by each counsel. However, the court notes that the references to Ms. Gomez’ age and other personal information by Mr. Willinger are offensive and certainly unnecessary to the

being met, the court is strongly cautioning the attorneys to conduct themselves in a professional and courteous manner as this matter progresses.

Accordingly, the plaintiffs' motion for reconsideration of the court's prior orders is denied and plaintiffs are directed to provide original and HIPAA-compliant authorizations, including one for the records of treatment by Dr. Lawrence Fedor, to all counsel as set forth in the preliminary conference and compliance conference orders. Plaintiffs are directed to comply within 30 days of the date of this order with a copy to the court. Plaintiffs' motion for sanctions is likewise denied.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
December 18, 2013



Judy Harris Kluger, J.S.C.

FILED

JAN 06 2014

COUNTY CLERK'S OFFICE
NEW YORK

substance of this motion. That he chose to divulge his own personal information is a questionable tactic, but his comments about Ms. Gomez were unfortunate at best. Further, they had no bearing on his request for sanctions since that request was predicated on her letter of October 3, 2013.